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No. 95-617

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ELIZABETH G. CURTIS, *et al.*,

Petitioners,

v.

SCHOOL COMMITTEE OF FALMOUTH, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a voluntary condom availability program adopted by the School Committee of the Town of Falmouth violates any protected rights of family privacy or parental liberty under the Due Process Clause of the Fourteenth Amendment.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

For the purposes of certiorari consideration, the facts of the case are adequately presented in the opinion of the Supreme Judicial Court of Massachusetts. App. 4a-6a. However, Petitioners' statement of facts does not make clear that under Massachusetts state law, students may attend public, private or home schools. Mass. Gen. L. ch. 76, § 1 (1982).

In addition, Petitioners have mistakenly given the impression that, "Public opposition to the proposed [condom availability] policy was overwhelming." Pet. at 3. On May 19, 1992, the condom availability program was submitted to a vote at the annual town election. An undisputed majority voted in favor of the program.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THIS COURT SHOULD DENY THE PETITION FOR WRIT OF CERTIORARI BECAUSE THERE IS NO CONFLICT BETWEEN THE DECISION OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS AND "ANOTHER STATE COURT OF LAST RESORT."

Rule 10(b) of the Supreme Court Rules provides that this Court may grant a petition for writ of certiorari when

> a state court of last resort has decided an important federal question that conflicts with the decision of another state court of last resort or of a United States court of appeals.

Petitioners argue that their petition for writ of certiorari should be granted because a conflict exists between the decision of the Supreme Judicial Court of Massachusetts holding the condom availability program constitutional, and the decision of an intermediate appellate court in *Alfonso v. Fernandez*, 606 N.Y.S.2d 259 (N.Y. App. Div. 1993), *leave to appeal dismissed*, 637 N.E.2d 279 (N.Y. 1994). In fact, there is no genuine conflict because *Alfonso* was decided as a matter of state law, and the views of the panel on the constitutional principle at issue here were *dicta*. The "conflict," if

any, is between the holding of the Massachusetts high court and the *dicta* of a New York intermediate court. Such "conflict," if any, neither merits plenary consideration nor requires final resolution by this Court because it is not a conflict between two state courts of last resort.

The *Alfonso* decision was rendered by a divided panel of the New York Supreme Court, Appellate Division. The New York Court of Appeals, New York's court of last resort, dismissed the motion for leave to appeal. Dismissal of a motion for leave to appeal is not the equivalent of an affirmance, and the order denying the motion for leave to appeal has no precedential value.[1] *See Two Associates v. Brown*, 516 N.E.2d 1219 (N.Y. 1987); *State Communities Aid Assoc. v. Regan*, 506 N.E.2d 535 (N.Y. 1987); *In re Marchant v. Mead-Morrison Mfg.*, 169 N.E. 386 (N.Y. 1926). The court of last resort of the State of New York, the Court of Appeals, simply has not spoken on the constitutional issues discussed in the *Alfonso* case (and also raised by the present case); therefore, there is no relevant conflict between a court of last resort in Massachusetts and a court of last resort in New York. Indeed, if the New York Court of Appeals ever chose to address these issues, its decision could be consistent with that of the Massachusetts Supreme Judicial Court.

This Court has dismissed writs of certiorari as improvidently granted when it became apparent that an alleged conflict did not actually exist. *See, e.g., Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923)

[1] The Court of Appeals may hear appeals from the Appellate Division if "the construction of the constitution of the state or of the United States is directly involved therein." N.Y. Const. art. 6, § 3b(7). Therefore, the Appellate Division was not the court of last resort for the constitutional issues presented by *Alfonso*.

(writ dismissed as improvidently granted when Court concluded that decisions of Fifth and Ninth Circuit Courts of Appeal were not in conflict). This Court noted that a writ of certiorari is warranted in the case of a conflict "where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal." *Id.* at 393. The same rationale properly applies to this Court's certiorari discretion with respect to decisions of state courts. This Court should only grant a writ of certiorari "where there is a real and embarrassing conflict of opinion and authority" between the state courts of last resort. Because no such conflict exists in the present case, the petition for writ of certiorari should be denied.

II. THE *ALFONSO* COURT STATED AN INDEPENDENT AND ADEQUATE STATE LAW BASIS FOR ITS DECISION.

As noted above, the intermediate appellate court in *Alfonso* based its decision primarily upon New York state law. Therefore, its adjudication of the constitutional claims was unnecessary,[2] its views are *dicta* and any claim that the courts of two states conflicted on a *federal* question is further foreclosed. Because this Court will not review judgments of state courts that rest on adequate and independent state grounds,[3] the existence of a conflict between two state courts should not be predicated upon a case decided upon those grounds.

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[2] The *Alfonso* decision did not invalidate the New York condom program; rather, the court ordered that a parental consent provision be added to conform to the requirements of pre-existing state law. While its constitutional analysis reached the same conclusion, it was gratuitous.

[3] *See Herb v. Pitcairn*, 324 U.S. 117 (1945); *Michigan v. Long*, 463 U.S. 1032 (1983).

The dispositive issue decided in *Alfonso* was whether New York Public Health Law § 2504 established an applicable exception to the common-law requirement of parental consent for providing a health service to a minor child. The court stated that the distribution of condoms

> is clearly a health service for the prevention of disease which requires parental consent. . . . [W]hile the purpose of the condom availability component of the program may be commendable, the Legislature has not acted to abrogate the common-law rule and to authorize the New York State Commissioner of Education or the respondents to direct or permit the delivery of such a health service to minor, unemancipated high school students in public school buildings without some parental role through opt-out or consent.

606 N.Y.S.2d 259, 263-264.

The Supreme Judicial Court of Massachusetts faced no state law issues and specifically recognized the state law basis for the *Alfonso* decision:

> [W]e point out that the [*Alfonso*] decision was based more directly on a State law which required parental consent for medical treatment. The [*Alfonso*] court concluded, erroneously we think, that the distribution of condoms constituted a medical service for which parental consent was required. *See Alfonso v. Fernandez*, 606 N.Y.S.2d 259 (Eiber, J., dissenting).

Curtis v. School Committee of Falmouth, 652 N.E.2d 580, 586 (Mass. 1995); App. 13a (internal citation omitted).

The adequate state law basis for the court's opinion in *Alfonso* therefore eliminates the presence of a significant federal question. In the absence of a conflict regarding a substantial federal question between two state courts "of last resort," the petition should be denied.

III. THE ISSUES PRESENTED DO NOT WARRANT PLENARY REVIEW.

In affirming the state trial court's grant of summary judgment in favor of the Respondent School Committee of Falmouth, the Supreme Judicial Court of Massachusetts found that "the condom-availability program in Falmouth is in all respects voluntary and in no way intrudes into the realm of constitutionally protected rights."[4] *Curtis* at 583; App. 5a-6a. The program neither requires nor forbids any conduct. No child is forced to receive counseling or to obtain condoms, and certainly no sanction -- against parent or student -- is imposed for failure to participate in the condom availability program. The program does not compel students to disregard parental instructions or teachings;[5] it does not command or forbid conduct that is at odds with any family's values; it does not require or forbid anything at all.

[4] The factual basis for this finding is not challenged by Petitioners at this stage of the proceedings.

[5] The petition is laced with references to the school helping children to defy their parents (*see* Pet. at 7, 9, 10); there is no evidence that the school has assumed any role in "helping" students to defy parental wishes. Contrary to the assertions of Petitioners, the decision to obtain condoms and/or counseling is a matter within each student's discretion and subject to his or her parents' guidance because, as the Supreme Judicial Court correctly found, the program "is in all respects voluntary." *Curtis* at 583; App. 5a-6a.

A. The Voluntary Condom Availability Program Adopted By The Respondent School Committee Of Falmouth Does Not Interfere With Parental Rights Or Liberties.

Respondents recognize parents' liberty interest in directing the upbringing and education of their children. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). However, "neither rights of religion nor rights of parenthood are beyond limitation. . . . [A state's] authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

The state does not have the power to foreclose the freedom of individuals or groups to choose an alternative method of education. *See Meyer* and *Pierce, supra.* Only *burdensome* state restrictions upon parental choices have been declared unconstitutional. In *Meyer*, this Court struck down a state's attempt to prohibit teaching any subject in a language other than English -- subject to criminal penalties. In *Pierce*, this Court found that a statute requiring parents to send their children to public school "unreasonably interferes with the ability of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534-35. Similarly, in *Yoder*, this Court found that a state statute requiring school attendance until age 16 (and containing criminal sanctions) impaired the free exercise of the Amish religion. *Id.* at 236.

Each of these cases challenged a mandatory requirement or prohibition involving some compulsory requirement and imposing a criminal sanction for noncompliance. In

sharp contrast, the Falmouth condom availability program is entirely voluntary, prescribes no conduct and imposes no penalty. Parents can still instruct their children in a manner consistent with their own moral and religious convictions. There being no genuine limitation upon parental choice, this case presents no important issue that merits review by this Court.

Petitioners attempt to equate potential exposure to the school program to a loss of parental liberty. This effort fails for two reasons. First, public school attendance is, ultimately, a matter of parental choice, a choice guaranteed by successive rulings of this Court. Government retains the right to set the curriculum in its own schools and those who object may choose to exercise their right to select private or other alternate educational programs. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). *See also Care and Protection of Charles*, 504 N.E.2d 592, 597 (1987). Having selected public schools, parents cannot thereafter contend that optional school activities deprive them of their rights.

Petitioners' reliance upon *Lee v. Weisman*, 505 U.S. 577 (1992), is misplaced. That case does not teach that "mere exposure" to an objectionable school policy in a voluntary setting represents an impermissible burden upon fundamental rights. Rather, *Lee* holds that prayer offered by clergy as part of an official public school graduation ceremony is forbidden by the Establishment Clause of the First Amendment. The constitutional limitations upon public prayer at a school function stated in *Lee* are far removed from the issue of raised by a condom availability program. *Lee*, therefore, does not address whether an entirely voluntary program violates parental rights, or whether parents should have control over any element of such a program.

Even if a First Amendment analysis was applied to the facts of this case, the same conclusion of no constitutional violation would be reached. This Court has rejected a claim that a voluntary public school program which permitted students to attend religious activities during school hours put the "weight and influence of the school . . . behind a program for religious instruction." *Zorach v. Clauson*, 343 U.S. 306, 309 (1952).

B. This Court Has Demonstrated A Preference for Avoiding Local School Disputes Unless Basic Constitutional Values Are "Sharply Implicated."

The dispute presented in this case is of the type best suited for local resolution. This Court "has long recognized that local school boards have broad discretion in the management of school affairs." *Board of Education v. Pico*, 457 U.S. 853, 863 (1982). Further,

> [c]ourts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.

Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

Because Petitioners have failed to demonstrate a coercive burden upon their rights as a result of the challenged condom availability school program, their complaint should be viewed as a local matter best handled outside the judiciary.

At the heart of Petitioners' challenge to the condom availability program is a moral objection to the policy choice

made by the School Committee of Falmouth. The sincerity of Petitioners' objection is unquestioned, but this is precisely the type of objection best raised before other branches of government. As Justice O'Connor observed:

> However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires. . . . The Constitution does not, and the courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours. That task, to the extent it is feasible, is for the legislatures and other institutions.

Lyng v. Northwest Indian Cemetery Protective Ass'n., 485 U.S. 439, 452 (1988).

C. The Court Below Used The Proper Standard For Evaluating Petitioners' Claims.

Petitioners assert that the court below used "an erroneously high threshold" for evaluating their constitutional claim. Pet. at 8. The Supreme Judicial Court of Massachusetts properly required a showing of a substantial or a coercive burden upon a liberty interest before undertaking a constitutional analysis. Finding no such burden presented by the facts of this case, the court below did not reach the questions of state interests or justification of the challenged program.[6]

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[6] It is not difficult to predict that the condom availability plan could, in a proper case, pass even strict scrutiny review. As long ago as 1977, this Court took judicial notice of the "devastating" problems associated with the fact that "the incidence of sexual activity among minors is high."

The threshold for establishing an unconstitutional violation of a right protected by the Due Process Clause should certainly be no less exacting than a claimed violation of the First Amendment, where a coercive burden must be shown. In that context, "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *School Dist. v. Schempp*, 374 U.S. 203, 223 (1963). More recently, this Court has stated, "As our jurisprudence relating to all liberties . . . has recognized, not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right." *Planned Parenthood v. Casey*, 505 U.S. 833, ___, 112 S. Ct. 2791, 2818 (1992).

In sum, Petitioners have offered no authority for the proposition that the *claim* of a "burden" on parental rights, standing alone, entitles them to full constitutional analysis.

Carey v. Population Services Int'l., 431 U.S. 678, 695-696 n.21 (1977). These problems have only escalated in the years since *Carey*, as HIV and AIDS cases have reached crisis levels.

CONCLUSION

For the reasons stated herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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